IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 24.03.2007

CORAM

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Second Appeal No.570 of 1994
and
C.M.P. No.8280 of 2006

Nagammal ... Appellant

Vs

Valliammal ... Respondent

PRAYER:

Second Appeal against the Judgment and decree of the learned Sub-ordinate Judge, Tiruvallur dated 31.12.1993 and made in A.S.No.17 of 1990 on his file reversing the judgement and decree of the learned District Munsif, Tiruvalur, dated 07.12.1989 and made in O.S.No.191 of 1989.

For Petitioner : Mr.G.Jeremiah

For Respondent : Mr.N.R.Anantha Rama Krishnan

J U D G M E N T

The plaintiff in the Trial Court is the Appellant. The plaintiff filed a suit for redemption of mortgage against the defendant on receipt of the mortgage amount of Rs.400/- and also for possession.

2. The case of the plaintiff was that the suit property which is a tiled house along with a vacant site comprised in Natham Poramboke Survey No.502/1 at Selai Kandigai Village, Tiruvallur Taluk, which was originally mortgaged jointly by the plaintiff□s husband Anandan and his father Doraisamy Reddy to the defendant under the mortgage deed, dated 21.01.1973 marked as Ex.A.1, by which the defendant took possession. The plaintiff□s husband Anandan died in 1983 before his father and ultimately his father Doraisamy Reddy also died on 17.11.1988. Thereafter, the plaintiff claming to be the legal heir has issued notice dated 05.10.1988 to the defendant for redemption marked as Ex.A.2 for which the defendant has issued a reply notice, dated 13.10.1988 marked as Ex.A.3 and filed the suit for redemption.

3. The defendant filed written statement stating that the plaintiff has lost her right or redemption since the mortgagor has sold the equity of redemption to Subramania Reddy, S/o Perumal Chetty under a sale deed dated 05.08.1974 marked as Ex.B.1 and from the said Subramania Reddy, the defendant has purchased the hypothica by oral sale. The Trial Court found that the defendant has not proved the oral purchase from Subramania Reddy in respect of the mortgaged property and held that under Section 54 of the Transfer of Property Act, read with Registration Act, if the value of the property is more than Rs.100/- it requires registration and therefore, there cannot be a sale in favour of the defendant and in that view has decreed the suit in favour of the plaintiff. It was as against the said judgement of the Trial Court, the defendant filed the appeal.

4. The Appellate Court however has reversed the findings of the Trial Court on the basis that when the husband of the plaintiff Anandan predeceased father even in 1983, it cannot be accepted that the plaintiff is the proper legal heir. The Appellate Court has also relied upon Ex.B.1 stating the mortgage property has already been sold by the mortgagor, namely, Doraisamy Reddi to Subramania Reddy as early as 1974 and by virtue of the sale the plaintiff being the legal heir of the mortgagor has lost the right of redemption and it was on that basis the appeal of the defendant was allowed and the suit was dismissed. It is as against the judgement and decree of the First Appellate Court, the plaintiff has filed the present Second Appeal.

5. At the time of admitting the appeal, the following substantial question of law was framed by this Court:

"1. Whether the decree of the lower appellate court reversing that of the Trial Court and holding that the right of the appellant to redeem the property is lost, is sustainable in law?

2. Whether, when the respondent claims to the property under an oral sale which is not valid (considering the value of the property) she can maintain and resist the appellant's right to redeem the property?

3. Whether the respondent can resist the right to redeem considering the nature of the mortgage and the stipulations therein?

4. Whether the right to redeem is lost under the sale deed Ex.B.1 dated 5.08.1974?"

6. The question to be considered in this case is as to whether the right of mortgagor to redeem the mortgage is lost under Ex.B.1 sale deed dated 05.08.1974. Admittedly, the original mortgagors, namely, Anandan, husband of the plaintiff and Doraisamy Reddy, the father of Anandan have jointly executed a mortgage deed in favour of the defendant on 21.01.1973 marked as Ex.A.1 and it is admitted that by virtue of the said mortgage the defendant is in possession.

7. It is also not in dispute that the mortgagor Doraisamy Reddy has executed a sale deed in favour of one Subramania Reddy under Ex.B.1 dated 05.08.1974 and the said Subramania Reddy is not connected with the mortgage deed, since he is not a mortgagor or a party to the mortgage deed. However, the defendant who is the mortgage under the mortgage deed marked as Ex.A.1 claims to have purchased the equity of redemption from Subramania Reddy under a oral sale.

8. At the outset, the law is clear on this aspect that when a sale is effected under Section 54 of the Transfer of Property Act, if the value of such tangible immovable property is less than Rs.100/- such transfer can be either by registered instrument or delivery of property and therefore, in cases where the value of property is less than Rs.100/- even a oral sale is permissible provided the factum of oral sale is proved by the party who is claiming the same. But as far as the property which is worth more

than Rs.100/- it has to be registered, to be a valid document as per Section 17 of the Registration Act, 1908.

9. In the present case, it is not in dispute that the property is worth more than Rs.100/- and in fact the value is stated as Rs.4000/- and therefore, a combined reading of Section 54 of the Transfer of Property Act along with Section 17 of the Indian Registration Act, contemplates that any such transfer has to be effected by a registered deed. When admittedly, it is the case of the defendant that she purchased the equity of redemption from Subramania Reddy who was not a party to the mortgage deed under a oral sale, such sale is not permissible in law and therefore, the question of her proving the sale does not arise. Even if the mortgagor himself has made such conveyance by way of transfer, it requires registration and the same cannot be done orally. Considering a similar circumstance, the Hon□ble Supreme Court has held that the right of redemption cannot be extinguished even if it is between the parties to mortgage in respect of the right under the immovable property value which is more than Rs.100/- without registration of such document. That was the judgement rendered in Narandas Karsondas Vs. S.A.Kamtam and another reported in 1977 SC 774. Therefore, on the face of it, there is no difficulty to come to the conclusion that under Ex.B.1 sale deed stated to have been executed by Duraisamy Reddy in favour of Subramania Reddy, the right of redemption of mortgagor has not extinguished, especially in the circumstance that the defendant herself claims the right from Subramania Reddy under a oral sale, which is not permissible for the reasons stated above.

10. There is one other legal point involved in this case; that is the right of redemption as enstrained under Section 60 of the Transfer of Property Act. Section 60 which gives a right to the mortgager to redeem the mortgage states as follows:

"60. Right of mortgagor to redeem.- At any time after the principal money has become (due), the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver (to the mortgagor the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee), where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by (decree) of a court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Redemption of portion of mortgaged property.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except (only) where a mortgagee, or, if there are more mortgagees than once, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor."

11. A reading of the Section clearly shows that the right of redemption cannot be extinguished except by "Act of Parties" or by decree of a Court. The term "Act of parties" means the parties to the mortgage deed and not an outsider. Therefore, it is clear that a purchase by the mortgagee subsequent to the mortgage of the equity of redemption will extinguish the right of mortgager to redeem and that is the meaning of the term "right of parties". This was the decision rendered by the Division Bench of the Andrapradesh High Court in Jalappa Vs. Narasimha Setty and others reported AIR 1963 Andhra pradesh 420. While narrating the provisions of Section 60 of the Transfer of Property Act, the Andrapradesh High Court has held
20. We would now refer to the express terms of Sec.60 of the Transfer of Property Act in so far as it is relevant:

"Section 60. At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgage (a) to deliver to the mortgage the mortgage deed and all documents relating to the mortgage property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgage . . . . . .
. . .

Provided that the right conferred by this Section has not been extinguished by act of the parties or by decree of a court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption."

The relevant portion of the judgement of the Andrapradesh High Court which was based on the earlier judgement rendered in Kunjbiharilal Vs. Riseshvath Sing reported in 1934 Owdh 98 is
"The express terms of the section postulate the right of redemption provided that it is not extinguished. An extinguishment of the right to redeem could be by act of parties or by a decree of court. A purchase by the mortgagee subsequent to the mortgage of the equity of redemption will extinguish the right to redeem, by act of parties. There is no particular form in which redemption is required to be made. It can be evidenced by the facts of a case and the conduct of the parties. Thus, where the mortgagor sold his property to the mortgagee and the sale price, equal to the mortgage money, due on the date, was appropriated by the mortgagee towards the mortgage in his accounts, it was held that the sale deed and the conduct of the parties were sufficient proof of redemption of the mortgage. Vide Kunj Behari Lal Vs. Bisheshwar Singh, AIR 1934 Oudh 98."

12. In an yet another earlier judgment of the Allahabad High Court rendered in Panna Lal Vs. Rameshar Sahai reported in AIR 1915 Allahabad 203, the Allahabad High Court has held the term "Act of parties" under Section 60 of the Transfer of Property Act means the Act of parties in mortgage transaction. The relevant portion of the said judgement is as follows:
"A mortgagor's right to redeem subsists until it has been extinguished by act of parties or order of a Court. Act of parties must mean act of the parties to the mortgage, transaction."

13. Therefore, it is clear that the right of redemption is the right of mortgagor unless it is extinguished by the Act of parties which means, parties to the mortgage deed or by the decree of court. In the present case, it is one of the mortgager Doraisamy Reddy, who has sold to a third party, namely, Subramania Reddy and not the mortgagee, the defendant. Therefore, the sale effected by Doraisamy Reddy in favour of Subramania Reddy under Ex.B.1 registered sale deed cannot be construed as purchase of equity of redemption within the meaning of "Act of Parties", since Subramania Reddy is not a party to the mortgage deed.

14. As I have stated earlier, the purchase stated to have been made by the defendant from one Subramania Reddy under oral sale is not valid in law and in view of the said fact, it is clear that the decision arrived by the learned First Appellate Judge is not based on the correct decision of law. It cannot be said that the plaintiff has no right of succession in respect of right of redemption of mortgage being the legal heir, which is not in dispute.

15. In view of the above said legal position and the factual situation the judgement and decree of the First Appellate Court is set aside and the judgement of the Trial Court is confirmed and the appeal stands allowed with costs. Consequently, the connected C.M.P. is closed.

nbj

[PRV/10022]